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No. 79-1965

In the Supreme Court of the United States

October Term, 1979

THE COUNTY OF LOS ANGELES, ET AL.

Petitioners

v.

F. RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR NON-FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR NON-FEDERAL RESPONDENTS IN OPPOSITION

The State of Michigan, the American Federation of State, County and Municipal Employees, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations, which were authorized to intervene as defendants in the District Court, herewith file a joint brief in this Court, as they did in the court below.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. *Jurisdiction*

A. *Subject Matter.*

Did the District Court have subject matter jurisdiction of this action to enjoin the 1976 amendments to the Federal Unemployment Tax Act (FUTA) which provide for coverage of certain State and local government employees, notwithstanding the Federal Tax Anti-Injunction Act (26 U.S.C. 7421(a)), the limitation stated in the Declaratory Judgment Act (28 U.S.C. 2201-2202), and the express remedy provided States by 26 U.S.C. 3310?

B. *Standing.*

1. Do the petitioner political subdivisions of a State have standing to challenge the constitutionality of the amendment to FUTA which are the subject of this action?

2. Do the petitioner States have standing to raise against the United States the asserted unconstitutional denial of federal tax credits to their resident employers?

II. *The Constitutional Issue*

Are the amendments to FUTA which are challenged in this action a valid exercise of Congress' spending power under Article I, Section 8, Clause 1 of the United States Constitution?

JURISDICTION

We accept the other parties' description of the basis of this Court's jurisdiction to review the judgment of the Court of Appeals. However, as appears hereinafter, we submit that the District Court did not have subject matter jurisdiction of this action.

COUNTERSTATEMENT OF THE DECISIONS BELOW AND OF THE CASE

The federal respondents' brief in opposition sets out the decisions below and the pertinent facts and procedural stages of this litigation. To avoid unnecessary duplication, we therefore rely on those portions of that brief.

REASONS FOR DENYING THE WRIT

I(A) The District Court Lacked Subject Matter Jurisdiction Over This Action.

As the federal respondents demonstrate (Fed. Br. in Opp. 5), the District Court correctly held that this action is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a) and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. (Pet. App. 36a.) For, whatever the scope of the former Act may be in other contexts, this case involves "FUTA taxes, to which the prohibitory command of § 7421(a) indisputably applies". *Bob Jones University* v. *Simon,* 416 U.S. 725, 741. The limitation stated in the Declaratory Judgment Act is at least as restrictive. *Id.* at 732-733, n. 7. And, petitioners do not even claim that they have made the showing required in *Bob Jones*—that " 'it is clear that under no circumstances could the Government ultimately prevail . . .' " *Id.* at 737 quoting *Enochs* v. *Williams Packing Co.,* 370 U.S. 1, 7. Further, Congress has in 26 U.S.C. § 3310 provided a specific review procedure in which a State may challenge a disqualification determination and raise any constitutional or other legal issue. See Pet. App. 5a.

Accordingly, the District Court correctly dismissed this action for lack of subject matter jurisdiction. The Court of Appeals chose for prudential reasons—"inter-circuit comity and the concomitant husbanding of scarce judicial resources" (Pet. App. 5a)—to decide the constitutional issue raised on the merits. But those grounds are obviously not applicable in this Court. Thus, even if the constitutional questions which petitioners press had substance (but see point II, *infra*), the insurmountable jurisdictional obstacle to their obtaining any relief compels the denial of *certiorari.*[1]

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[1] While we respect the federal respondents' caution in filing a conditional cross-petition for a writ of *certiorari* (No. 80-72), we believe that course to be unnecessary even under the strictest reading of cases such as *NLRB* v. *International Van Lines,* 409 U.S. 48,

I(B)(1) The Political Subdivision Petitioners Have No Standing to Bring This Action.

There is an additional jurisdictional issue with respect to all the non-state petitioners, namely, whether the cities, counties and other political subdivisions of the States (hereafter the "subdivisions") have standing to bring this action. We submit that they do not. The subdivisions' lack of standing results from the nature of the unemployment compensation program; *viz,* that it is a "scheme of cooperative federalism" (*King* v. *Smith,* 392 U.S. 309, 316), to which a State, and its political subdivisions and its citizens are subject only if the State by law so chooses. In analyzing this issue it is therefore necessary to treat separately the petitioners whose state laws would remain in effect even if the FUTA amendments are struck down, and those whose state laws contain "self-destruct" provisions whereby the state laws fall if challenged federal amendments are held to be unconstitutional.

(i) *Political Subdivisions in States with Conforming Laws That Do Not Contain Self-Destruct Provisions.*

Some state laws which cover employees of their political subdivisions in conformity with FUTA do not provide that the continued existence of the laws depends on the constitutionality of the challenged amendments. The political subdivisions in those States obviously lack standing because a declaration of invalidity of the federal law or an injunction against its application would provide them no effective relief. "No likely end would bring them loss or leave them happier than before."[2] For it is clear that the "in-

52, n. 4, since each of the grounds set forth in Point I of this brief would compel the same result as rejection of the arguments presented in the Petition in this case; *viz,* affirmance of the judgment of the Court of Appeals (Pet. App. 6a), which affirmed the judgment of the District Court dismissing the "instant action" (Pet. App. 31a).

[2] W. B. Yeats, "An Irish Airman Foresees his Death."

jury" which these petitioners assert is due to their own state law, which would remain in effect whatever the outcome of this litigation.

Even if its own law was prompted (or to use petitioners' term "coerced" (Pet. 22)) by the federal law, a decision striking down the latter would at most instruct the State that it may change its law without being decertified and losing federal benefits; a plainer instance of a request for an advisory opinion is not readily imagined. These petitioners are therefore in no better position that the plaintiffs who were denied standing in *Warth* v. *Seldin*, 422 U.S. 490, 507-508 and *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40-46, because their allegations of injury resulting from the challenged regulation were deemed to be too "speculative". Petitioners simply cannot show that concrete injury which is an indispensable element of standing As the Court held in *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 220-221:

> Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions. [Footnote omitted.]

(ii) *Political Subdivisions in States with Conforming Laws That Do Contain Self-Destruct Provisions.*

In any State whose conforming law provides that it will expire if the amendments challenged herein are invalidated, a decision favorable to the subdivision petitioners would relieve them of the obligations to provide unemployment compensation benefits for their employees, *but they can achieve that result only by invalidating their own state laws.* Thus, their action is, in substance, even if not in form, a suit to nullify their own state law.[3] "Municipal corporations have regularly been denied standing in the federal courts to attack state legislation as violative of the Federal Constitution, on the ground that they have no rights against the state of which they are a creature." *Hart and Wechsler's The Federal Courts and The Federal System* (2d ed. by Bator *et al.*, 1973), p. 182.

The leading case is *Hunter* v. *Pittsburgh*, 207 U.S. 161, 177-179:

> We think the following principles have been established by [our prior decisions] and have become settled doctrines of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, na-

[3] Of course, these petitioners would not be in a better posture if their complaint were taken at face value, that is, as attacking the FUTA amendments alone. For, since those amendments do not act on them directly, a decision voiding the federal law would avail them nothing; they would then be in the same posture as the subdivisions whose status in this action was discussed in the previous subsection.

> ture, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. • • •

In short, as Mr. Justice Cardozo wrote in *Williams* v. *Baltimore*, 289 U.S. 36, 40:

> A municipal corporation, created by a state for the better ordering of government has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.

Further elaboration of this point is wholly unnecessary since in *United States* v. *Wheeler*, 435 U.S. 313, 320-321, this Court succinctly defined the relationship between States and their political subdivisions. The Court there contrasted the relationship between the federal and state governments, which are separate sovereignties and that between States and cities:

> By contrast cities are not sovereign entities. "Rather, they have been traditionally regarded as

> subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds* v. *Sims*, 377 U.S. 533, 575. A city is nothing more than "an agency of the State." *Williams* v. *Eggleston*, 170 U.S. 304, 310. Any power it has to define and punish crimes exists only because such power has been granted by the State; the power "derive[s] . . . from the source of [its] creation." *Mount Pleasant* v. *Beckwith*, 100 U.S. 514. As we said in *Waller* v. *Florida*, 397 U.S. at 393, "the judicial power to try petitioner . . . in municipal court springs from the same organic law that created the state court of general jurisdiction."

To allow the subdivision petitioners to prosecute an action whose objectives include nullification of laws enacted at "the will of their creator" (*Williams* v. *Baltimore*) would impair an "attribute of sovereignty attaching to every state government" and thereby truly undermine "the States as States," (cf. *National League of Cities* v. *Usery*, 426 U.S. 833, 845).

I(B)(2) The Petitioner States Lack Standing To Assert Any Federal Constitutional Issues On Behalf of Their Citizens.

The elaborate, emotional and tendentious arguments in the Petition which proclaim that the challenged FUTA amendments bear unconstitutionally on the States' employer-citizens who lose federal tax credits if the State fails to comply therewith are likewise not properly before this Court for the simple reason that the States plainly lack standing to assert them.

First, one party generally lacks standing to challenge tax assessments imposed on someone else. *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26. Second, and precisely in point, a State may not assert its citizens' rights against the federal government, for in such controversies

it is the United States, rather than the State which is *parens patriae*. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486, *Florida* v. *Mellon*, 273 U.S. 12, 18. The latter case also establishes that a State's claim that it will be placed at a competitive disadvantage if it fails to comply with the conditions of FUTA and employers lose their federal tax credits and leave the State is "purely speculative" and, at most, only "remote and indirect"; such a claim is therefore nonjusticiable. *Id.* at 17-18.

II. The Amendments To FUTA Are Constitutional

Like the court below and the federal respondents, we accept, and commend to the Court, the reasoning of the United States Court of Appeals for the First Circuit in *New Hampshire* v. *Marshall* (appeal pending, No. 79-1846) which held that the Tenth Amendment issue in this case is interred by *Steward Machine Co.* v. *Davis*, 301 U.S. 548, and is by no means revived by *National League of Cities* (see Pet. App. 16a-24a). Nor shall we elaborate on the federal respondents' demonstration that the basic federal unemployment compensation statutory system which is challenged herein is the same as that which was sustained in Mr. Justice Cardozo's classic opinion in *Steward Machine*. Fed. Br. in Opp. 6-8.

It does bear mention, however, that petitioners' effort to distinguish *Steward Machine* predicated on portions of Solicitor General Jackson's submissions in that case is entirely meretricious. See Pet. 19, Pet. App. 58a-63a. The argument at Pet. 19 that the Government's focus in *Steward Machine* on the taxing power ought to be viewed as a concession that the spending power does not also support FUTA wrests the Government's position in that case out of its context—*viz*, a response to the constitutional objections of the individual *taxpayer*. In contrast and contrary to the Petition herein (at, e.g., 2, 19-20), the amendments challenged in this case impose *no* tax whatsover upon the

States or their political subdivisions. The assertion that "State tax payments of State and local government employers * * * are covered into the federal unemployment trust fund in the United States Treasury" (Pet. 12) is correct (see Pet. App. 34a), but the further contention that this fund "in accordance with Article I, Section 9, Cl. 7 of the Constitution can be invaded only by Congressional appropriation" (Pet. 12) is false, as *Steward Machine* demonstrates. In fact, the States are at any time free to withdraw this money which is held in the trust fund for custodial purposes. See 301 U.S. at 576, 595-597; see also 42 U.S.C. § 1104(f).

Although they rest their entire Tenth Amendment argument on *National League of Cities,* petitioners would have this Court forget its careful reservation there of the question "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1 or § 5 of the Fourteenth Amendment." 426 U.S. at 852, n. 17.

The extent of that power is established by *Steward Machine,* 301 U.S. at 586-588 and its companion case, *Helvering* v. *Davis,* 301 U.S. 619, 640. See also *Maher* v. *Roe,* 432 U.S. 464, 475-476, *Harris* v. *McRae,* ..... U.S. ....., No. 79-1268 (June 30, 1980) and the precedents cited at Fed. Br. in Opp. 12, each of which upholds programs conditioning the receipt of federal funds by States on their acquiescence in federal rules on subjects at the very core of state authority.

To be sure, Mr. Justice Cardozo posited, "We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power." *Steward Machine,* 301 U.S. at

590. But that caution is not remotely apposite here. For, the presently challenged amendments merely perfect the scheme of the unemployment compensation provisions of the original Social Security Act by expanding the class of protected individuals. "* * * Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry. Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services." *California Dept. of Human Resources* v. *Java*, 402 U.S. 121, 132. By adding state and local employees, Congress sought to assure that the loss of purchasing power by this increasingly large segment of the population would not have adverse consequences on the private economy. Even if this is an objective which Congress could not achieve by *requiring* the States and their subdivisions to provide unemployment compensation benefits to their former employees—a proposition which is far beyond the scope of this case—it plainly has a rational relationship to the objective of the federal program and is thus a valid condition on the continued receipt of federal funds and the preservation of federal tax credits.

The federal respondents' brief in opposition (at pp. 9-11) documents the scope of the Government's generosity in the exercise of its spending power under the FUTA program. Petitioners do not protest that these figures are exaggerated; on the contrary, their point is that Congress' largesse is so great that the conditions imposed thereon have been transmuted from "motive" to "coercion." See, e.g., Pet. 20, 30. But surely the First Circuit was correct in refusing to "agree that the carrot has become a club because rewards for conforming have increased" (Pet. App. 18a).

Petitioners stress the economic competition between States to attract business and the level of tax rates as an

important element of that competition. But in *Steward Machine* Mr. Justice Cardozo was fully aware of this economic reality and further that it is indispensable that a national program be created lest this competition be mutually destructive See 301 U.S. at 588 & n. 9. Because of this competitive reality many States, although they favored the national program, protected themselves against the consequences of an adverse constitutional ruling with respect to FUTA by including self-destruct provisions in their conforming unemployment compensation programs. See *id.* and *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 507.

Now petitioners declaim, in a variation on a theme from the past, "All the states, either as parties or as *amici curiae* through their national associations, have objected to the FUTA amendments" (Pet. 31). It is a relatively minor fault of that assertion that it overlooks the State of Michigan's conscious choice to ally itself with the Government as well as with the respondent unions (cf. Pet. 2, n.2) in support of the 1976 amendments. The fundamental errors are the failure to understand the reasons for Michigan's choice and the true nature of the federal system that was established by the founders of the Nation in 1787—an error exposed in *Steward Machine*, 301 U.S. at 586-589. For if it were ever established that the Government may not condition the continuation of programs which it substantially finances on the adoption by the States of standards closely related to the objectives of those programs, the Government would henceforth have to go it alone. The States would thereby be deprived of the significant measure of control which they presently enjoy with respect to such cooperative federal-state programs both in the formulation of policy and in their day-to-day operations. To hold that *National League of Cities* established the federal-state relationship contemplated by petitioners is a proposition which is far too fanciful to merit the consideration of this Court.

CONCLUSION

For the above-stated reasons, as well as those stated by the federal respondents, the petition for a writ of certiorari should be denied.

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